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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JAIME G. et al., Persons Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. DANIEL G., Defendant and Appellant.	F064418 (Super. Ct. No. JVV064833) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum, Chief Deputy County Counsel, and Jason Chu, Deputy County Counsel for Plaintiff and Respondent.

[*] Before Wiseman, Acting P.J., Levy, J., and Franson, J.

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Appellant Daniel G. is the father of Jaime G., Daisy G. and Isaac G., who are presently eight, seven, and four years old. After removing the children from their mother's custody and declining to place them in Daniel's custody, the juvenile court provided Daniel with 12 months of reunification services, terminated those services, and finally held a hearing under Welfare and Institutions Code section 366.26[1] and terminated Daniel's parental rights. In this appeal, Daniel argues that the court erred when it denied his request to refrain from terminating his rights under the statutory exception for situations in which the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) We affirm the order terminating parental rights.

FACTUAL AND PROCEDURAL HISTORIES

Daniel's relationship with the children's mother, Melissa A., began in 2003, around the time Melissa became pregnant with their oldest child. The parents were never married. Both parents have developmental disabilities, for which they have received services in the past from the Central Valley Regional Center. Daniel was diagnosed as a child with mild mental retardation and as an adult with borderline intellectual functioning. Daniel also has a visual impairment and is legally blind.

Two of the children had special needs. Jaime had diagnoses of microcephaly and bilateral upper motor neuron dysfunction (spastic diplegia).[2] At one time, he was prescribed Ritalin for attention deficit hyperactivity disorder. Isaac had a language delay. At two years six months, he had no language skills.

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[1]Statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2]This is a form of cerebral palsy. (<http://en.wikipedia.org/wiki/Spastic_diplegia> [as of Nov. 1, 2012].)

According to Melissa, Daniel physically abused the children and physically abused her in front of the children throughout their relationship. He first abused her when she was pregnant with their oldest child, in 2003 or 2004. In 2004, during a telephone conversation with a police dispatcher, Daniel threatened to shoot Melissa. In 2005, Daniel was arrested and charged with making a criminal threat (Pen. Code, § 422), brandishing a weapon (Pen. Code, § 417, subd. (a)(1)), and disturbing the peace (Pen. Code, § 415). All the charges were dismissed. Melissa said that in 2008, when Jaime was six, Daniel threw him across a room. In 2009, Melissa went to a police station and reported that Daniel hit Jaime on the stomach with an open hand.

Before the present case, from 2004 to 2010, the Tulare County Health and Human Services Agency received 10 referrals on the family. Two of these were substantiated:

(1) Allegations against both parents of general neglect of Jaime were found to be substantiated on June 3, 2004. Jaime had been admitted to the hospital for failure to thrive a few months after his birth, and it appeared that the parents had not been feeding him properly because they did not understand how to mix his formula. A voluntary family maintenance case was opened and the agency provided services and referrals.

(2) Melissa moved with the children to a battered women's shelter on May 4, 2010. Melissa reported that Daniel shook and spanked Jaime for hitting his sister. She also claimed that Daniel sexually abused two of the children. She said he placed them on his lap and moved them around and became aroused. The agency determined that allegations of general neglect and sexual abuse were unfounded, but allegations of emotional abuse were substantiated. Melissa signed a safety plan stating she would protect the children from Daniel, among other things.

After separating from Daniel, Melissa initiated an action in family court to establish custody of the children. On June 23, 2010, the court awarded her sole custody pending trial, with supervised visits for Daniel.

On July 2, 2010, nine days later, Melissa called the agency and said she believed she was unable to care for the children. She was suffering from stress because of the family court case and was experiencing anxiety and panic attacks. She feared she would have a heart attack or a stroke. She said the children were out of control and she could not manage them. The agency took the children into protective custody.

The agency filed a juvenile wardship petition on July 7, 2010. After the combined jurisdiction/disposition hearing on July 29, 2010, the court sustained the petition's allegations that both parents had failed to protect the children from the parents' domestic violence. The court also sustained an allegation that Melissa had mental health issues that rendered her unable to provide care. The court dismissed an allegation that the children had been left without any provision for their support. The children were adjudged wards of the court and removed from Melissa's custody. The court found that placement with Daniel would not be in the children's best interest. The court ordered reunification services for both parents. The children remained together in the foster home where they had been placed on July 2, 2010.

The court ordered Daniel to complete domestic violence and psycho-social assessments and follow the recommendations of the evaluators. It also ordered him to participate in individual counseling, group and individual parenting classes, and a program called Healthy Boundaries for the prevention of sexual abuse. Daniel was also ordered to reopen his case at the Central Valley Regional Center and seek services there.

The juvenile court held a six-month review hearing on January 25, 2011. In its status review report for the hearing, the agency reported that Melissa last visited the children in October 2010 and had stated that she no longer wanted to reunify with them and would not be completing her reunification services. She said, "'I want a better life for them. I don't take care of them like I need to take care of them. I can barely take care of myself.'" Melissa had also voluntarily dismissed her case in family court and had

withdrawn her request in that case for a restraining order against Daniel. In a declaration, she stated that she had "'no problems with Daniel ….'"

Daniel was working on his case plan and was in compliance with most parts of it. He was participating in a batterer's intervention program and individual counseling, was visiting with the children, and was in the process of being evaluated by the Central Valley Regional Center. He had completed individual and group parenting classes. He had not yet enrolled in the Healthy Boundaries classes. The agency recommended that Daniel's reunification services be continued.

In spite of this recommendation, the agency's report also detailed the difficulties Daniel was experiencing. The domestic violence evaluator found that her assessment took twice as long to complete as usual because of Daniel's apparent cognitive impairment and because he insisted on spending time criticizing Melissa. He presented as having an "enmeshed and controlling relationship" with Melissa. He also lacked knowledge about his children's emotional and developmental needs and lacked understanding about healthy boundaries in an intimate relationship. He initially refused to attend the batterer's intervention group. As an illustration of Daniel's lack of understanding of the children's needs, the agency's report described incidents during visits in which he failed to change the diaper of the youngest child, Isaac, or failed to take him to the bathroom when necessary.

On the day in October 2010 when the family court action was dismissed, Daniel and Melissa had lunch together after the hearing. Daniel was annoyed because Melissa's cell phone rang several times, so he took it from her and broke it. Daniel admitted this and told an agency clinician it made him feel better. He was not remorseful.

Daniel was consistent in attending scheduled visits with the children twice a week, but he missed one visit and was late for another. The missed visit was due to a panic attack, for which Daniel went to a hospital. He was late for one visit because he encountered Melissa in a store on the way and had an argument with her.

The foster mother reported to the agency that the children were out of control and had trouble winding down after the visits. Jaime had tantrums after the visits, and Daisy was acting out and having nightmares.

The foster mother also reported that Daniel was persistent in making critical comments to her, in front of the children, about Melissa. Daniel told the foster mother that Melissa was using drugs and prostituting herself. The social worker called Daniel to tell him he must not make these comments in front of the children. Daniel appeared not to understand the inappropriateness of his actions and instead repeatedly insisted that his remarks had been true.

The social worker believed Daniel had "not fully accepted that the relationship [with Melissa] is over" and was "focused on his relationship with the mother before his relationship with the children." He had "difficulty comprehending the fact that the mother is choosing not to reunify and … seems to focus a great deal of his attention on the mother and what she is now doing with her life." Melissa sometimes appeared at Daniel's home unannounced and the agency believed this would result in conflict in front of the children if they were returned to Daniel.

The agency concluded:

> "In summary, although the father is complying with his required services, the father's limited cognitive functioning appears to be impacting the father's ability to learn new skills and the father is not yet able to demonstrate how the services are benefitting him, particularly when it comes to caring for his children's physical and emotional well-being. The father's continued lack of awareness of the children's basic needs shows that the father is not yet capable of caring for the children or protecting the children from his continued codependency with the mother."

The children were reported to be happy in their foster home. Jaime and Daisy were behind their grade levels in school. Jaime was going to be placed in special education classes. Daisy was expected to catch up. Isaac was not in school yet. He was

nearly toilet trained. The agency reported that the foster mother appeared to be "able to handle all three of them with ease."

The two older children, Jaime and Daisy, were receiving therapy. Jaime's therapist wrote that Jaime was "benefiting from a structured home environment" and was responding to therapy to "overcom[e] past trauma to improve functioning." Daisy's therapist stated that the foster mother was providing "a safe, stable home environment" and that providing Daisy with "the opportunity to form a healthy attachment to consistent, positive adults will likely function as a defining factor in helping her achieve her mental health goals." Isaac was too young for therapy.

In August 2010, several weeks after the children's detention, Jaime and Daisy had dental examinations. Both were found to have multiple cavities and scheduled to have them filled under general anesthesia.

The court found that Daniel had made substantial progress and granted him six additional months of reunification services. It also found that returning the children to Daniel at that time would be detrimental to them. The foster placement was to continue. Reunification services to Melissa were discontinued.

On May 26, 2011, the agency filed a request to reduce Daniel's visits from two, two-hour visits per week to one, one-hour visit. An unexplained deterioration in the children's behavior after visits had occurred:

> "[Jaime] experiences the following behaviors: anxiety, whining, tantrums, wetting his pants during the day, lying (he previously never lied), aggression and anger. Daisy is experiencing the following behaviors: baby talks, nightmares, startles [easily[, extra nervous when in the bathroom, sleep terrors, and talks about the 'kakacooey.'[3] Isaac is experiencing the following behaviors: whiney, temper tantrums. Both Daisy and [Jaime] experience issues with using the restroom after the visits: [Jaime] with not wanting to use the bathroom to the point of wetting his pants, and Daisy

[3]From remarks elsewhere in the record, it is apparent that the intended reference is to "cucuy," a Spanish bogeyman.

> with being easily startled in the bathroom and acting nervous if anyone walks by the bathroom door when she is in it. These behaviors carry over into school and do not occur only in the foster home."

The social worker supervised several visits and observed nothing that would explain the deterioration in the children's behavior. The agency convened a meeting with Daniel, the foster mother, and several service providers involved in the case to explore the issue. Daisy's therapist opined that Daisy's behavior was typical of children who have been sexually abused. Daniel said Melissa had shown the children adult movies. Later, Daisy's and Jaime's therapists concluded that something about the visits must be triggering the deteriorating behavior and that the frequency of the visits should be reduced.

According to a letter written by the foster mother and submitted by the agency in support of the request to reduce visits, the children were sometimes hostile or indifferent toward Daniel at visits. On one occasion, Jaime became angry when Daniel entered the visiting room, while Daisy refused to look up at him or greet him. When the foster mother returned to pick the children up at the end of the visit, Daniel asked for a hug. Jaime and Isaac gave him hugs after being asked twice, but Daisy refused. As they were driving away, Daisy angrily said to the foster mother, "'Gran Gran, why did you take so long!!'"

The juvenile court granted the request to reduce visits on June 8, 2011.

The 12-month review hearing took place on August 22, 2011. The agency recommended that the juvenile court terminate Daniel's reunification services and set a hearing for the termination of his parental rights. The agency determined that the children were adoptable and the foster mother said she was willing to adopt them. The foster mother also said she was willing to raise Melissa's fourth child, with whom Melissa was then pregnant (and who was not fathered by Daniel), if Melissa should decide she was unable to care for the baby.

In its report for the hearing, the agency stated that Daniel had, over the 12-month reunification period, participated regularly in all the services in which he was asked to participate. In spite of this, Daniel's "limited cognitive functioning appears to be impacting [his] ability to learn new skills" and he remained unable to care for and protect the children adequately.

Daniel's participation in the batterer's intervention group did not prevent him from engaging in hostile behavior toward other adults on several occasions. He used abusive language in speaking to the agency's visit coordinator. He cursed at his therapist. During a batterer's intervention session, he verbally attacked another participant. The man asked to leave early because he feared Daniel would attack him in the parking lot. Daniel's counselor in the batterer's intervention program said the program would be putting Daniel's case on hold because, after 26 weeks of classes, Daniel still did not admit he had a problem and had made no progress. He blamed others, including the social worker, his therapist, the agency, and Melissa, for the court's decision to require him to attend. He did not appear to understand why others felt threatened or intimidated by his outbursts. To the social worker, Daniel "readily admit[ted] he [did] not have any empathy for the mother and for any abuse he may have inflicted on the mother."

Daniel's therapist told the agency that Daniel's "cognitive delays prevent him from being able to apply any of the new skills he is learning to actual life situations." Daniel attempted to apply the therapist's suggestions in his interactions with the children, but his attempts went awry. At one visit, the therapist observed that Daniel paid attention to the boys, Jaime and Isaac, but ignored his daughter, Daisy. The therapist brought this to Daniel's attention. At the next visit, Daniel paid attention exclusively to Daisy, ignoring the boys. At another visit the therapist observed that Daniel lacked effective techniques for controlling the children's misbehavior. She suggested that he use a "time out," a technique that had been covered in Daniel's parenting class. At the next visit, Daniel put Jaime "in a 'time out' with very little justification and no warning, as if he was just

trying … to prove that he was following the therapist[‘s] recommendations.” The therapist told the agency that, “due to [Daniel’s] cognitive delay,” he “may be unable to learn and implement new strategies that he will need in order to raise three children.”

The Central Valley Regional Center, which provides services to developmentally disabled people, deemed Daniel ineligible for services because his diagnosis, borderline intellectual functioning, did not qualify. Daniel told his therapist he was not interested in services from the center in any event, and was happy he did not qualify. At the hearing, Daniel admitted he “wasn’t really that much open-minded about” receiving services from the center.

Daniel’s therapist also said Daniel’s effectiveness as a parent was limited by his refusal to accept help related to his vision impairment. As an example, the therapist mentioned an incident during a visit when Daniel attempted to clean up the room at the end of the visit, but left an item of food on the floor because he could not see it. If he had been at home, the food would have remained on the floor. According to the therapist, in-home supportive services could assist Daniel with housekeeping and other activities, but Daniel was not interested in such help. At the hearing, however, Daniel testified that he was willing to get help with his vision impairment.

The children continued to make progress in the foster placement. In September 2010, shortly after the children were first detained, Jaime was unable to write numbers in order. When asked to fill in a grid with the numbers 1 to 30, he wrote five numbers and seven letters in no particular order. In March 2011, he was able to write the numbers 1 to 100 without errors. The agency attributed the improvement to the foster mother’s efforts in working with Jaime. Daisy’s kindergarten teacher reported that, by the end of the school year, Daisy had attained grade-level performance in math. She was not yet at grade level in reading, but had made excellent progress and was expected to reach grade level soon. Daisy’s therapist reported that Daisy was working on issues, including night terrors, her fear of a ghost, her heightened startle reflex, and her regression following

visits with Daniel. Isaac was three and not attending school or receiving therapy. He had been referred to the Central Valley Regional Center for an evaluation. The agency reported that the children "all appear to be attached to the" foster mother. The foster mother said the children do not ask about visits with either parent or about whether they will be returning to live with either parent.

The juvenile court agreed with the agency's recommendations. It found that there was no substantial probability that the children could be returned to Daniel within the next six months. It found that he did not make substantial progress in the court-ordered treatment programs or in resolving the problems that led to the children's removal, and that he did not show that he could provide for the children's safety or physical and emotional needs. It terminated Daniel's reunification services and scheduled a hearing to terminate his parental rights under section 366.26.

The court held the section 366.26 hearing on January 10, 2012. Daniel testified that he loved his children very much. He said each of the children was bonded to him, enjoyed his visits, and wished the visits could be longer. The children asked him when they would be coming home.

Daniel's therapist testified that she observed some of the visits. All of the children appeared happy to see their father during the visits, and he spoke courteously and civilly with them. At the ends of the visits, the children were not sad and were ready to leave with the foster mother.

Daniel's father testified. He observed some of the visits and found that they went well. The children were happy to see Daniel.

In its report for the hearing, the agency stated that Daniel engages the children during visits, focuses his attention on them, and appears to be appropriate. The visits continued to appear to trigger negative behavior in the children afterwards.

The agency's report stated that the foster mother was a 52-year-old single woman who lived in "a beautiful home in a quiet neighborhood" in Tulare County. She had run a

daycare center for many years. She had three adult children who lived nearby and supported her decision to adopt and a number of close friends in the area who provided social support. She "has raised the children like they are her own and provides them with all of the structure, love, and care they need." She had proved her ability to meet their needs.

The agency recommended that the court terminate Daniel's parental rights, terminate his visits, and identify adoption by the foster mother as the children's permanent plan. The children's counsel agreed. Daniel's counsel argued that Daniel had a close relationship with the children and that termination of his parental rights would be detrimental to them. He argued that the court should apply section 366.26, subdivision (c)(1)(B)(i), providing that the court can refrain from terminating parental rights if the parent has maintained regular visitation and the children would benefit from continuing the relationship.

The juvenile court followed the agency's recommendation. It had "no doubt whatsoever that Mr. [G.] dearly loves his children and that the children have a relationship with him." It stated, however, that the "statutory presumption at the permanency planning stage is that termination of parental rights is in the best interest of the children," and a parent arguing for an exception under section 366.26, subdivision (c)(1)(B)(i), has the burden of proving the contrary. The parent "must show that he or she has a parental role in the child's life resulting in a significant, positive emotional attachment from the child to the parent," not only "frequent and loving contact" or "an emotional bond with the children or pleasant visits." The court found that Daniel had not made the necessary showing. It terminated Daniel's parental rights and stated that adoption was the permanent plan. On its own motion, it designated the foster mother as the prospective adoptive parent.

DISCUSSION

Daniel now argues that the court erred when it declined to apply the exception in section 366.26, subdivision (c)(1)(B)(i). That statute provides that the court will not terminate parental rights if:

> "(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:
>
> "(i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship…."

As the court pointed out, this provision comes into play only at the end of the process, when there is a statutory presumption in favor of termination. Section 366.26, subdivision (c)(1), states that after the court has terminated reunification services and found that a child is likely to be adopted, it "shall" terminate parental rights, unless an exception applies. Our Supreme Court has said that "[a]fter the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation] …." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

In *In re Autumn H.* (1994) 27 Cal.App.4th 567, the Court of Appeal interpreted former section 366.26, subdivision (c)(1)(A), which contained the exception now set forth in section 366.26, subdivision (c)(1)(B)(i). It interpreted the exception to require a finding that the parent-child "relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.*, *supra*, at p. 575.)

> "In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the

> preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

The parent has the burden of making this showing. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 574.)

We review the court's ruling under the abuse of discretion standard. This means that we review the court's findings of fact for substantial evidence and its conclusions of law de novo, and we reverse its application of law to facts only if it is arbitrary and capricious. (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.)

Daniel was found at the jurisdiction/disposition hearing to have exposed the children to domestic violence. Throughout the subsequent period, he remained obsessed with criticizing Melissa even though she had removed herself from the situation. He continued to exhibit outbursts of temper. He failed to demonstrate his ability to provide for the children's needs. He participated in services, but the service providers opined that he did not benefit from them and did not change his behavior or improve his functioning. His visits with the children were pleasant and uneventful by the time of the section 366.26 hearing, but there was evidence from which the court could reasonably conclude that the visits were not of great importance to the children. Further, although there was no evidence to explain how Daniel's visits with the children were causing the children to have behavioral problems afterward, the court could reasonably infer that these problems were somehow related to the children's relationship with Daniel. Meanwhile, the children were exhibiting considerable progress under the care of the foster mother, who wished to adopt them. The court could find, within the bounds of reason, that continuing the children's relationship with Daniel would not benefit them enough to outweigh the benefits of making them available for adoption by the foster mother.

Daniel argues that the foster mother's age (52 at the time of the § 366.26 hearing) means she eventually may need help with the children. He says that if his rights were not terminated and she became their legal guardian instead of their adoptive mother, he could

be a "possible adjunct resource" for them. The legal guardianship would provide sufficient permanence and stability without requiring the loss of the children's relationship with their father.

The juvenile court did not abuse its discretion in rejecting this notion. It could reasonably find that Daniel showed neither that the foster mother would need his assistance nor that he was able to provide any material assistance. The court also could reasonably conclude that legal guardianship may not provide the same degree of stability and permanence as adoption. By statute, adoption is the preferred permanent plan. (§ 366.26, subd. (b).)

Daniel cites *In re Brandon C.* (1999) 71 Cal.App.4th 1530. That case does not help him. There, the Court of Appeal held that the juvenile court did not abuse its discretion in declining to terminate parental rights under former section 366.26, subdivision (c)(1)(A), and ordering legal guardianship as the permanent plan. (*In re Brandon C., supra,* at p. 1533.) Because of domestic violence, the children, twins, were detained and placed with their paternal grandmother a few months after their birth. (*Id.* at p. 1532.) The dependency case went on for nearly four years, during which time the mother consistently visited with the children. (*Id.* at pp. 1532, 1536.) The grandmother, who was 69, preferred adoption as the permanent plan, but was willing to accept legal guardianship. (*Id.* at p. 1533.) In rejecting the agency's recommendation to terminate parental rights, the juvenile court "credited the testimony from both mother and grandmother that there was a close bond between mother and the boys, and that a continuation of contact would be beneficial to the children." The agency failed to present any evidence to the contrary. (*Id.* at p. 1537.)

The present case is not similar. Here, the juvenile court did not credit Daniel's view that he had a close bond with the children, the continuation of which would benefit them. The agency did present evidence to the contrary. The record does not compel us to reject the juvenile court's determination.

For all the above reasons, we conclude that the juvenile court acted within its discretion in declining to apply the exception in section 366.26, subdivision (c)(1)(B)(i), and terminating Daniel's parental rights.

DISPOSITION

The order of the juvenile court is affirmed.